



UNC
SCHOOL OF LAW

University of North Carolina School of Law
Carolina Law Scholarship
Repository

Faculty Publications

Faculty Scholarship

2009

The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights

Joseph E. Kennedy

University of North Carolina School of Law, kennedy4@email.unc.edu

Follow this and additional works at: http://scholarship.law.unc.edu/faculty_publications



Part of the [Law Commons](#)

Publication: *Harvard Civil Rights-Civil Liberties Law Review*

This Article is brought to you for free and open access by the Faculty Scholarship at Carolina Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights

*Joseph E. Kennedy**

The repudiation of rehabilitation and the embrace of retribution produced a collective experience for young black men that is wholly different from the rest of American society. No other group, as a group, routinely contends with long terms of forced confinement and bears the stigma of official criminality in all subsequent spheres of social life, as citizens, workers, and spouses. This is profound social exclusion that significantly rolls back the gains to citizenship hard won by the civil rights movement.¹

I. INTRODUCTION

Imagine the following. One in five of the men you knew had a prison record, and on any given day, one in ten of the men you knew was in jail or in prison. Members of your race were eight times more likely to be incarcerated than those of the majority race. Those incarcerated had a much harder time marrying, staying married, and parenting their children. Ten percent of the children you knew had a father in prison or jail. Your race used illegal drugs at only three quarters the rate of other races but was four times more likely to be arrested for a drug offense. One out of every five adults you knew could not vote because of felony convictions. All of these people were barred from holding public sector jobs, receiving public assistance (including financial aid for college), and obtaining professional licenses. As a result of these conditions, most members of your race were seen as a criminal class by the rest of society, and your race was deeply divided within itself by the presence of so many incarcerated and formerly incarcerated people.²

These imaginings describe the world of many urban African American communities in the United States. If this was your community and your race, you would probably consider the criminal justice policies responsible for such high levels of incarceration to be a civil rights issue of primary

* Associate Professor of Law, University of North Carolina School of Law. The author would like to thank Maxine Eichner, Eric Muller, Maria Savasta-Kennedy, Andrew Taslitz, and Deborah Weissman for their helpful comments on the manuscript of this article. Special thanks are owed to Al Brophy who did much to educate me about the history of the civil rights movement in this country. The author also thanks Mika Chance for invaluable research support and the editors and staff of the *Harvard Civil Rights–Civil Liberties Law Review* for their excellent work throughout the publication process. Remaining shortcomings are the responsibility of the author alone.

¹ BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 6 (2006).

² See *infra* Part II.

importance. For much of the twentieth century, however, civil rights organizations focused the majority of their resources and attention on fighting other forms of social injustice. Education, housing, employment, and voting have been the primary concerns of the civil rights movement for most of the last seventy years. More specifically, these causes have been the primary concerns of the National Association for the Advancement of Colored People (“NAACP”) and the NAACP Legal Defense Fund, the two organizations that have played the central role in legal reform in the area of racial justice for African Americans.³ Recently, however, the NAACP has identified challenging the mass incarceration of African Americans as one of its main priorities in the coming years.⁴

To understand the importance of mass incarceration as a civil rights issue, one must understand the direct effects of mass incarceration on African American communities and families. Yet one must also understand the vision of African American families and communities upon which mass incarceration is premised and rhetorically justified. Social scientists have studied and documented mass incarceration’s impacts on the urban communities where incarceration is most concentrated,⁵ but the premises of mass incarceration have not yet been fully understood.

Simply put, mass incarceration ultimately rests on the notion that African Americans need to be incarcerated in historically unprecedented numbers because of a moral breakdown in their communities that has resulted in a significant increase in serious crime.⁶ This moral breakdown serves as a justification for adopting what I describe in this article as a “fundamentalist

³ While the NAACP’s initial focus was protecting African Americans from lynching, mob violence, and gross miscarriages of criminal justice, the organization began to shift its focus in the 1930s to economic issues such as education and employment. See, e.g., August Meier & John H. Bracey, Jr., *The NAACP as a Reform Movement, 1909-1965: “To Reach the Conscience of America,”* 59 J. S. HIST. 3, 13-17 (1993); see also William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2065, 2073-96 (2002) (noting that the NAACP in the 1940s broadened its focus from the “politics of protection”—that of protecting African Americans against exclusively state-sponsored threats to life, liberty, and property—to the “politics of recognition”: ending discrimination and exclusion of African Americans in the private as well as public spheres). Even after this shift in focus, however, the NAACP worked to protect the procedural rights of criminal defendants and mounted a major campaign against the death penalty. Eskridge, *supra*, at 2096, 2287-99.

⁴ MONIQUE MORRIS, NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE, YEAR ONE: TOWARD SAFE COMMUNITIES, GOOD SCHOOLS AND A FAIR CHANCE FOR ALL AMERICANS, 3, 5-8 (2009) (noting the harmful effects of mass incarceration on people of color and calling for alternatives to incarceration). Since his appointment in May of 2008, the President of the NAACP, Benjamin T. Jealous, has spoken forcefully about the importance of challenging mass incarceration. “‘A hundred years from now we’re going to be judged by our grandchildren,’ he says. ‘They’re going to look back, and they’re going to say, this country had the most incarcerated on Earth. Young black people were the most incarcerated in modern history. What did you do about it?’” Adam Server, *The Other Black President: The NAACP Confronts a New Political—and Racial—Era*, AM. PROSPECT, Feb. 23, 2009, at 12.

⁵ See *infra* Part III.

⁶ See *infra* Part III.A.

approach” to punishment. Under the fundamentalist approach to punishment, crime is assumed to be the product of a basic moral failure in both the individual offender and in the community at large, not the product of any set of social conditions or circumstances. This fundamentalist approach, in turn, leads to the policies that have resulted in the mass incarceration of African Americans. Mass incarceration seems necessary to people who believe that African American communities suffer from widespread moral breakdown.

Properly understood, such a belief in moral breakdown is indefensible. Recent work by sociologists, criminologists, and economists suggests that poor urban African American communities are not communities whose norms of moral behavior have broken down, but communities whose moral norms have come under unprecedented strain.⁷ In fact, significant social science evidence suggests that the residents of the poorest African American urban communities believe deeply in the family and in economic values of mainstream American society but are unable to realize those values because of the emergence of a relatively new and concentrated form of jobless poverty during the 1970s, 1980s, and 1990s.⁸

This distinction between moral breakdown and moral strain is a critical one. In communities that have suffered moral breakdown and have no norms, incarcerating large numbers of criminals may be the only way to maintain order and to regenerate the core moral norms that have been lost. Punishment in a normless community must be severe and inflexible in order to send the strongest possible message to both the individual and the community about the need for new norms of behavior. Such policies of mass incarceration, however, are an unnecessary response to crime in a community whose norms of moral behavior remain intact but are badly strained by socioeconomic conditions. These policies are, in fact, counterproductive because mass incarceration actually disintegrates vulnerable communities.⁹

Mass incarceration is a critical civil rights issue facing African Americans for a second distinct but related reason. Mass incarceration as a practice “demoralizes” the broader movement for civil rights for African Americans in ways that also have not been sufficiently appreciated. Mass incarceration has robbed the civil rights movement of some of the moral authority it enjoyed during the years of its early successes. The significance, pervasiveness, and visibility of mass incarceration as a social policy confirm its own false premise of moral breakdown among poor African American communities by stigmatizing those communities. Moreover, fundamentalist ways of thinking about punishment directly support fundamentalist ways of thinking about broader issues of racial justice. Under the fundamentalist mindset, the moral failings of African Americans are responsible for crime and their inability to achieve further economic progress, not the social or

⁷ See *infra* Parts III.B and IV.A.

⁸ See *infra* Part IV.B.

⁹ See *infra* Part II.

economic conditions they face. In both domains this social fundamentalism sees the essential problem to be a lack of personal responsibility, and contextual factors only reinforce this view. Directly challenging racially disproportionate mass incarceration is essential to “remoralizing” and reinvigorating the quest for racial justice for those most vulnerable to other forms of discrimination. The mass incarceration of African Americans is the unguarded and badly exploited flank of the movement for racial justice. Defending that flank is important to civil rights progress on any other front.

The story of the Jena Six and the truly startling national response that it mobilized suggests that the time may be right for just such a challenge. The sudden and overwhelming response to the manifest injustices of the Jena Six case may prove to be a turning point in the marginalization of criminal justice issues as core civil rights concerns. Seemingly out of nowhere, a national movement arose in response to a clearly egregious case of racial injustice, but one that was not without precedent or parallel. What is perhaps most notable in this respect is that the Jena Six case is, like mass incarceration, essentially a case of egregiously disproportionate punishment that is deeply influenced by racial factors.¹⁰

Part II of this Article describes how mass incarceration disintegrates poor African American communities politically, socially, and economically. Part III explains how mass incarceration is premised on a vision of moral breakdown in African American communities. Part IV argues that available evidence suggests that this premise is false and that the communities concerned suffer from moral strain, not moral breakdown. The Conclusion briefly argues that challenging mass incarceration is essential in order to make continued progress in other areas of the movement for civil rights, and that the national response to the Jena Six case suggests that the time might be ripe for such a challenge.

II. THE DISINTEGRATIVE IMPACT OF MASS INCARCERATION ON AFRICAN AMERICAN COMMUNITIES

For those living in the communities most affected, mass incarceration has undone many of the gains of the civil rights movement. Incarceration is so widespread and long-lasting in the poorest African American urban communities that it has profoundly changed the very nature of those communities. A major theme in the literature studying the effects of such extensive incarceration is disintegration. Mass incarceration disintegrates families and communities by destabilizing economic, familial, and political relationships and creating enduring barriers to the future integration of the incarcerated person back into the life of their community.

¹⁰ See, e.g., Gabriel J. Chin, *The Jena Six and the History of Racially Compromised Justice in Louisiana*, 44 HARV. C.R.—C.L. L. REV. 361, 361-62 (2009).

African American communities have always suffered from discrimination and more than their share of poverty, but mass incarceration is a relatively recent phenomenon. Before the beginnings of mass incarceration in the late 1970s, such poor communities did not suffer from widespread incarceration because prison was reserved for the most serious offenders.¹¹

Although young minority men with little schooling had relatively high rates of incarceration, before the 1980s the penal system was not a dominant presence in disadvantaged neighborhoods. Criminal behavior, as officially recognized by the police, was much more unusual than poverty. . . . For the most part, prisons housed extremely violent offenders, hardcore drug addicts, and career criminals—an underground guild of burglars, thieves, and hustlers.¹²

Mass incarceration has changed the relationship between poverty and punishment. “Punishment has become normalized, affecting large social groups rather than just the behaviorally distinctive deviants in the shadows of social life.”¹³ Indeed, rather than a punishment for deviance, incarceration is becoming increasingly normal for young disadvantaged men.¹⁴ With the advent of mass incarceration, prison has gone from being a minor presence in the lives of African American communities to a regular one.

African Americans are incarcerated in numbers greatly disproportionate to their share of the population. Simply put, “African Americans are eight times more likely to be incarcerated than whites.”¹⁵ The sheer extent of incarceration among African Americans is almost difficult to comprehend. “Among black men born in the late 1960s who received no more than a high school education, 30 percent had served time in prison by their mid-thirties; 60 percent of high school dropouts had prison records.”¹⁶ According to one study, on an average day in 1999 almost 8% of African American men aged thirty to thirty-four and 30% of young African American men who were high school dropouts were in prison or jail.¹⁷ Overall, “black men in their early thirties at the end of the 1990s were more likely to have been to prison than to have graduated from college with a four-year degree.”¹⁸

¹¹ Bruce Western, Mary Pattillo & David Weiman, *Introduction* to *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION* 1, 2 (Mary Pattillo, David Weiman & Bruce Western eds., 2004).

¹² *Id.*

¹³ *Id.* at 3.

¹⁴ *Id.*

¹⁵ WESTERN, *supra* note 1, at 3.

¹⁶ *Id.*

¹⁷ Western et al., *supra* note 11, at 6-7.

¹⁸ WESTERN, *supra* note 1, at xii. While more than 90% of prisoners are men, the incarceration of women in these communities—though much smaller in number—may have an impact out of proportion to their numbers because of the role women often play in their communities. See TODD CLEAR, *IMPRISONING COMMUNITIES* 10 (2007) (“The role women play in their social

The disintegrative effect of incarceration on African American family life has been well documented. Incarceration weakens and strains marriages.¹⁹ It also reduces the incidence of marriage. One study estimates that incarceration is why 20% fewer African American men are married than white men. Incarceration also deprives many African American children of the presence of their fathers. “By 2000, over a million black children—9 percent of those under eighteen—had a father in prison or jail. In around half of all cases, these fathers were living with their children at the time they were incarcerated.”²⁰ Furthermore, “[a] child who is exposed to a parent or sibling who went to prison has an *increased*, rather than a decreased, risk of incarceration.”²¹ The evidence also suggests that many of these men played some role in the lives of their families before being incarcerated. In the mid-1980s, roughly half of African American fathers admitted into the state prison system were living with their children—approximately the same percentage as white prisoners; by the mid-1990s, the number had dropped to 40% for African American fathers.²² While racial breakdowns are not available, we know that many prisoners maintain contact with children while incarcerated. “Nearly half of all incarcerated parents have some kind of regular contact with their children,” with 20% to 25% of parents receiving regular visits from their children.²³

Mass incarceration also divides offenders from their communities in other ways. Putting incarceration aside, the collateral consequences of a felony conviction alone can bar an ex-offender from many forms of participation in normal community life. A study in the mid-1990s showed a marked increase in the number of states with laws allowing felony convictions to be used to provide the basis for divorce, termination of parental rights, denial of the right to hold office, and loss of the right to possess a firearm.²⁴ Many states have also “increased the number of occupational bars for people with various criminal convictions,” including jobs as teachers, child care workers, and in related occupations.²⁵

Because the War on Drugs has resulted in felony convictions for many African American men, the special collateral consequences of drug convictions profoundly impact African American community life. An American

networks, social capital, and informal social controls, especially in very poor urban neighborhoods, is thought to be more important, per person, than men.”)

¹⁹ WESTERN, *supra* note 1, at 157 (“The evidence so far suggests that the prison boom separated many fathers from their children and contributed to low marriage rates and high risks of divorce among poor urban residents.”).

²⁰ *Id.* at 5.

²¹ CLEAR, *supra* note 18, at 6.

²² WESTERN et al., *supra* note 11, at 10.

²³ *Id.*

²⁴ Jeremy Travis, *Invisible Punishment: An Instrument of Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 22 (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter INVISIBLE PUNISHMENT].

²⁵ *Id.*

Bar Association task force summarized the collateral consequences of a felony conviction of a first time drug offender:

[A]s a result of his conviction he may be ineligible for many federally-funded health and welfare benefits, food stamps, public housing, and federal educational assistance. His driver's license may be automatically suspended, and he may no longer qualify for certain employment and professional licenses. . . . He will not be permitted to enlist in the military, or possess a firearm, or obtain a federal security clearance. If a citizen, he may lose the right to vote; if not, he becomes immediately deportable.²⁶

Oddly, a convicted armed robber or rapist can apply for student loans and welfare benefits but a drug offender cannot.²⁷

African American men are especially vulnerable to the impact of many of these legal restrictions. Public sector bans on employing ex-felons, for example, eliminate an entire category of jobs on which African Americans have historically relied for employment.²⁸ "The large numbers of blacks returning from prison, therefore, face an ever-shrinking pool of eligible jobs from which to transition out of crime."²⁹

Even where a formal rule against employing ex-felons does not exist, incarceration adversely affects employment opportunities for African American men in very profound ways. "Survey analysis shows that incarceration significantly reduces the wages, employment, and annual earnings of former inmates, even though their economic opportunities are extremely poor to begin with."³⁰ As more and more states make criminal records more widely available, government has effectively gone into the business of what Devah Pager has described as "the credentialing of stigma."³¹

²⁶ Marc Mauer & Meda Chesney-Lind, *Introduction to INVISIBLE PUNISHMENT*, *supra* note 24, at 1, 5 (citation omitted).

²⁷ *Id.* at 6.

²⁸ DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 33 (2007).

²⁹ *Id.*

³⁰ WESTERN, *supra* note 1, at 7. *See generally* PAGER, *supra* note 28, at 108-30.

³¹ PAGER, *supra* note 28, at 4. Pager writes:

For each individual processed through the criminal justice system, police records, court documents, and corrections databases detail dates of arrest, charges, conviction, and terms of incarceration. Most states make these records publicly available, often through on-line repositories, accessible to employers, landlords, creditors, and other interested parties. With increasing numbers of occupations, public services, and other social goods becoming off-limits to ex-offenders, these records can be used as the official basis for eligibility determination or exclusion. The state in this way serves as a credentialing institution, providing official and public certification of those among us who have been convicted of wrongdoing. The 'credential' of a criminal record, like educational or professional credentials, constitutes a formal and enduring classification of social status, which can be used to regulate access and opportunity across numerous social, economic, and political domains.

Id.

These “criminal credentials” matter greatly because employers “appear less concerned about specific information conveyed by a criminal conviction and its bearing on a particular job, but rather view this credential as an indicator of general employability or trustworthiness.”³² To explore how a criminal record affected employment decisions, Pager used black and white college students as “testers.” These testers used identical sets of fictional resumes and criminal records to apply for entry level jobs. Even her highly educated African American tester applicants suffered serious disadvantages in the application process. The existence of a criminal record reduced a black tester’s chance of being called back by 60%.³³ Comparatively, “blacks were less than half as likely to receive callbacks as equally qualified white applicants.”³⁴ Furthermore, a white tester with a criminal record had as good a chance of being called back for an interview as a black tester without a criminal record.³⁵

Despite the fact that the white applicant revealed evidence of a felony drug conviction, and despite the fact that he reported having only recently returned from a year and a half in prison, employers seemed to view this applicant as no more risky than a young black man with no history of criminal involvement.³⁶

Pager concluded that a “two strikes and you’re out” mentality existed among employers, who appeared “to view the combination of blackness and criminal record as an indicator of serious trouble.”³⁷ Even more disturbingly, Pager’s study revealed that these stereotypes and their attendant prejudices were exacerbated when the job applicants had personal contact with the employer. The gap between white testers with criminal records and black testers with criminal records was even greater when the employer had a chance to interact with the applicant.³⁸

³² *Id.* at 5.

³³ *Id.* at 69.

³⁴ *Id.* at 90.

³⁵ *Id.* at 90-91.

³⁶ *Id.* at 91.

³⁷ PAGER, *supra* note 28, at 146. Pager explains:

Racial stereotypes triggered by the appearance of a young black man . . . are further intensified by the revelation of his criminal past. Subtle and perhaps unconscious concerns about black applicants are at once confirmed, weakening any incentive to give a young black man the benefit of the doubt. Among young white men, by contrast, the reaction is likely to be quite different. Because whites do not fit the stereotypical profile of a criminal, employers may be more willing to overlook a single prior conviction. A young white man with a criminal background can more convincingly explain that he made a regrettable mistake and has learned his lesson. His prior criminal involvement is then interpreted as an isolated incident rather than an internal disposition.

Id. at 101-02 (citation omitted).

³⁸ *Id.* at 105-07.

Finally, African Americans are also politically disenfranchised by the policies of mass incarceration. Originally applying only to those convicted of “high crimes,” felon disenfranchisement was greatly expanded after the Civil War.³⁹ Additionally, states have classified more and more crimes as felonies.⁴⁰ Manza and Uggen estimate that there were 5.3 million disenfranchised felons in the 2004 election, which was 2.5% of the voting age population.⁴¹

Felon disenfranchisement rules hit the African American population hardest of all. More than 1.8 million African Americans cannot vote because of felony convictions.⁴² The U.S. Civil Rights Commission identified felon disenfranchisement as “the biggest hindrance to black voting since the poll tax.”⁴³ Some studies estimated that “at least one in seven black men nationally have lost the right to vote.”⁴⁴ Manza and Uggen estimate that sixteen states disenfranchise 20% to 40% of their eligible African American voters on account of felony convictions; thirteen states disenfranchise 10% to 20%; and an additional fourteen states disenfranchise 5% to 10%.⁴⁵ “[I]n fourteen states, more than 1 in 10 African Americans have lost the right to vote by virtue of a felony conviction, and 5 of these states disqualify over 20 percent of the African American voting age population.”⁴⁶ Interviews with such disenfranchised African Americans reveal a profound sense of alienation arising from the various collateral consequences of their convictions.⁴⁷

Finally, mass incarceration is politically disintegrative in another way: it divides the black community against itself. “[T]he prison boom has driven a wedge into the black community, where those without college education are now traveling a path of unique disadvantage that increasingly separates them from college-educated blacks.”⁴⁸ By sowing division and

³⁹ JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 8 (2006).

⁴⁰ *Id.* at 8-9.

⁴¹ *Id.* at 76.

⁴² ELIZABETH A. HULL, *DISENFRANCHISEMENT OF EX-FELONS* 9 (2006).

⁴³ *Id.* (citations omitted).

⁴⁴ MANZA & UGGEN, *supra* note 39, at 80.

⁴⁵ *Id.*

⁴⁶ *Id.* at 79.

⁴⁷ *Id.* at 152. One woman in prison described the comprehensive and profound sense of alienation she expected to experience as a felon upon returning to society:

When I leave here it will be very difficult for me in the sense that I'm a felon . . . it will affect my job, it will affect my education . . . custody, it can affect child support, it can affect everywhere—family, friends, housing People that are convicted of drug crimes can't even get housing anymore Yes, I did my prison time. How long are you going to punish me as a result of it? It's the housing, it's the credit re-establishing I mean even to go into the school, to work with my child's class—and I'm not a sex offender—but all I need is one parent who says, “Isn't she a felon? I don't want her with my child.” Bingo. And you know that there are people out there like that.

Id.

⁴⁸ WESTERN, *supra* note 1, at 7.

exclusion within the racial community it affects most, mass incarceration makes itself that much harder to challenge.

In combination, the familial, economic, and political effects of mass incarceration have weakened and impoverished already poor communities. “Concentrated incarceration in those impoverished communities has broken families, weakened the social-control capacity of parents, eroded economic strength, soured attitudes toward society, and distorted politics; even, after reaching a certain level, it has increased rather than decreased crime.”⁴⁹ Mass incarceration in the poorest African American urban communities is so pervasive and so influential that it changes the very nature of community life in a profound and undesirable way:

Prison is thus woven into the fabric of these communities, with its stark implications for social networks, social capital, and, ultimately, informal social control. Men who are behind bars are the missing links in the social network of those who remain behind. Since these networks have limited strength to begin with, the widespread reality of prison undermines their ability to provide social capital. And neighborhoods with lots of men behind bars are places with especially low endowments of social capital. Because prison saps the limited economic and interpersonal resources of families with a loved one behind bars, both the families and the neighborhood stay impoverished.⁵⁰

Mass incarceration has also changed what it means for a young African American male to live a normal life in the community in a way that perversely perpetuates crime and further incarceration. Bruce Western has described how incarceration changes the normal life course of many African American men:

Adolescents are drawn into the society of adults by passing through a sequence of life course states—completing school, finding a job, getting married, and starting a family. The integrative power of the life course offers a way out of crime for adult offenders. Men involved in crime who can find steady work and a stable marriage also become embedded in a web of social supports and obligations. These social bonds help criminally active men desist from further offending. . . . Although the normal life course is integrative, incarceration is disintegrative, diverting young men from the life states that mark a man’s gradual inclusion in adult society.⁵¹

⁴⁹ CLEAR, *supra* note 18, at 5.

⁵⁰ *Id.* at 10 (citing DONALD BRAMAN, *DOING TIME ON THE OUTSIDE* (2004)).

⁵¹ WESTERN, *supra* note 1, at 4-5.

Whereas the normal life course draws young men into productive family and economic life, incarceration diverts and often effectively bars these men from integrating themselves into family and economic life. The disintegrated former offender becomes a high risk for future offending because nothing connects him to the normal life of the law abiding. To the contrary, incarceration has itself become a “rite of passage” for young African American men in the inner city.⁵² In this way, mass incarceration perversely increases crime, thereby sustaining itself in an ever more vicious cycle. “Large pools of former inmates with few social supports, family attachments, or economic opportunities may ultimately increase crime rates more than they were lowered by the expansion of the penal system in the first place.”⁵³

The end result is a profound social exclusion that for the communities most affected undoes much of the work of the civil rights movement.

The punitive turn in criminal justice disappointed the promise of the civil rights movement and its burdens fell heavily on disadvantaged African Americans. By cleaving off poor black communities from the mainstream, the prison boom left America more divided. Incarceration rates are now so high that the stigma of criminality brands not only individuals, but an entire generation of young black men with little schooling.⁵⁴

To be sure, serious crime is often committed by people who are not integrated into family or community and who might even be fairly described as normless. Such offenders are more likely to reoffend, in greater need for incapacitation, less likely to rehabilitate, and may even be more blameworthy. Because crime, too, has its disintegrative effects on a community, it is reasonable to assume that incarcerating serious offenders who are already disintegrated from their communities may be a net plus for the community in this respect. What is notable and distinct about the policies of mass incarceration, however, is that a default presumption that such offenders are the norm is effectively enshrined in sentencing standards and processes that are inflexible and severe. The wider the scope of incarceration in a community the greater the risk is that one is incarcerating those who may yet successfully integrate themselves into the fabric of the community. Such over-incarceration becomes a self-fulfilling prophecy in the sense that it weakens both the incarcerated individual’s capacity to reintegrate as well as diminishing the overall integration of the community itself.

⁵² CLEAR, *supra* note 18, at 9.

⁵³ Western et al., *supra* note 11, at 5; *see also* CLEAR, *supra* note 18, at 10 (“The high incarceration rates in poor communities destabilize the social relationships in these places and help cause crime rather than prevent it.”).

⁵⁴ WESTERN, *supra* note 1, at 7.

III. MASS INCARCERATION AND THE PREMISE OF AFRICAN AMERICAN MORAL BREAKDOWN

Mass incarceration was justified in great part by a narrative of moral decline generally and among urban African Americans specifically. The undeniable increase in crime that began in the 1960s and continued into the 1970s was interpreted in large measure as evidence of a moral decline in inner-city African American communities.⁵⁵ This much is well understood. What remains to be understood, however, is how mass incarceration was ultimately premised not just on a general decline in moral conduct but upon widespread moral breakdown, a distinction that matters greatly to how society approaches criminal punishment. Ultimately, the rhetorical backbone of mass incarceration is a narrative about the need for the criminal justice system to respond to a complete breakdown in family values and work ethic among inner city African Americans. In this narrative, moral breakdown necessitates what I will describe as a fundamentalist response to crime, a response designed to regenerate lost norms of moral behavior by taking a severe and categorical approach to dealing with relatively minor offenses and to even first offenders. The public accepted the need for extremely harsh punishment for minor crimes because they accepted the premise of moral breakdown that makes fundamentalism in punishment seem necessary and just.

This fundamentalist approach to punishment, however, proceeds from a flawed premise. No evidence exists to support the assumption that inner city crime was the result of a complete moral breakdown in the African American communities of the inner city. What evidence exists supports a very different conclusion. These communities suffered and continue to suffer not from moral breakdown but from moral strain, a key distinction that I will explain more fully. This moral strain has resulted from a new, concentrated form of jobless poverty that developed in the inner city during the 1970s, 1980s, and 1990s in the wake of a period of economic expansion that had recently drawn African American workers and families to these communities in unprecedented numbers. That strain notwithstanding, the available evidence suggests that African Americans continue to hold mainstream values and to aspire to the American Dream. White Americans' fears to the contrary may in fact be rooted in anxieties about family and community life that are more germane to middle class life than to that of the urban poor.

A. *Mass Incarceration and the Myth of Moral Breakdown*

All categories of crime, and violent crime in particular, increased by most objective measures in the 1970s, and the wider American public grew

⁵⁵ See *infra* Part III.A.

understandably concerned.⁵⁶ In this sense, mass incarceration did not simply come out of nowhere. It is the severity, the overbreadth, and the duration of the response to that crime increase that has drawn the attention and the criticism of so many.⁵⁷ The increase in incarceration that ensued over the following decades was far out of proportion to the crime increase. Over time the level of incarceration remained high even when crime rates dropped.

A number of different stories have been told about the role that race played in this disproportionate response to crime and in the disproportionate incarceration of African Americans. The backdrop for these stories is a larger story about white middle class backlash during the 1970s. African Americans and other people of color were seen to have benefited greatly during the 1960s from the victories of the civil rights movement and from social programs undertaken as part of the War on Poverty.⁵⁸ These gains were seen by many to have come at the expense of the white middle class: white workers lost jobs and educational opportunities to African Americans under affirmative action programs, and white middle class taxpayers were subsidizing social programs that they thought disproportionately benefited nonwhites. Against this backdrop, a number of different accounts have emerged about the role race played in the advent of mass incarceration.

Loïc Wacquant has argued that mass incarceration is a means of racial control that is the modern day equivalent of slavery.⁵⁹ Wacquant describes a successive series of “peculiar institutions” of racial control in the U.S., from chattel slavery to Jim Crow discrimination and segregation to the development of the urban ghetto in the wake of the large migrations of African Americans to the cities in the mid-1900s. The combination of the “hyperghetto” and the prison, an arrangement that he dates from 1968 to the present, is the final institutional phase and one that emerged in response to both the urban unrest and the racial progress of the 60s.⁶⁰ In Wacquant’s account, the economic and social isolation of the ghetto makes it an “ethnoracial prison,” and the racial composition of prison makes it a ghetto.⁶¹ Wacquant describes the emergence of these conjoined arrangements as “a single *carceral continuum* which entraps a redundant population of younger black men (and increasingly women) who circulate in closed circuit between its two poles. . . .”⁶²

⁵⁶ KEVIN R. REITZ & HENRY RUTH, *THE CHALLENGE OF CRIME* 73-80 (2003).

⁵⁷ See, e.g., MICHAEL TONRY, *THINKING ABOUT CRIME* 21-62 (2004) (discussing this problem and referencing several other commentators).

⁵⁸ THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 3 (1991) (describing conservative policies as successfully “pitting those who bear many of the costs of federal intervention against those whose struggle for equality has been advanced by interventionist government policies”).

⁵⁹ Loïc Wacquant, *From Slavery to Mass Incarceration*, 13 *NEW LEFT REV.* 41, 41-42 (2002).

⁶⁰ *Id.* at 42.

⁶¹ *Id.* at 49-51.

⁶² *Id.* at 52-53.

By the end of the seventies, then, as the racial and class backlash against the democratic advances won by the social movements of the preceding decade got into full swing, the prison abruptly returned to the forefront of American society and offered itself as the universal and simplex solution to all manners of social problems. Chief among these problems was the 'breakdown' of social order in the 'inner city' . . . As the walls of the ghetto shook and threatened to crumble, the walls of the prison were correspondingly extended, enlarged and fortified⁶³

Katherine Beckett has described a direct but subtler role for race in the politics of mass incarceration.⁶⁴ She has emphasized the ways in which the law and order politics of the 1960s and 1970s can be understood as a counter-attack against the civil rights movement. At the most basic level, "[s]outhern politicians and law enforcement officials who called civil rights protesters 'thugs' and decried 'crime in the streets'. . . were attempting to define protest activities as 'criminal' rather than political in nature."⁶⁵ Over time, however, the stakes became even greater as the civil rights movement expanded into a broader movement for social justice.

At stake was the question of whether the federal government is obligated to assume responsibility for creating a more egalitarian society. Without being explicitly identified as such, competing images of the poor as 'deserving' or 'undeserving' became central components of this debate. In drawing attention to the problems of street crime, drug addiction, and delinquency, and by depicting these problems as examples of the immorality of the impoverished, conservatives promoted the latter image. The crimes of the poor were thus used as evocative symbols of their undeserving and dangerous nature. The racialized nature of this imagery has been a crucial resource for those attempting to promote this conception and policies that reflect it.⁶⁶

Citing survey research that law and order politics are "particularly popular among those who hold racially and socially conservative views," Beckett concludes that racial hostility formed a key component of support for punitive anticrime policies.⁶⁷

Most recently, Michael Flamm has emphasized the ways that hostility to crime and hostility to political movements for civil rights and social justice blended easily together in the politics of law and order in both conscious

⁶³ *Id.* at 52.

⁶⁴ KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 12 (1997).

⁶⁵ *Id.* at 6.

⁶⁶ *Id.* at 11.

⁶⁷ *Id.* at 12.

and unconscious ways.⁶⁸ “At a popular level, law and order resonated both as a social ideal and political slogan because it combined an understandable concern over the rising number of traditional crimes . . . with implicit and explicit unease about civil rights, civil liberties, urban riots, antiwar protests, moral values, and drug use.”⁶⁹ Part of the appeal of law and order rhetoric is the way in which it simplifies social disorder into a story about bad guys, good guys, and the need for firm moral leadership by government.⁷⁰

What draws these somewhat different accounts together is the central story about moral decline that plays out in each. Stephanie Coontz has described the “new consensus” on the African American family that emerged during this time. “Black poverty exists because black men are irresponsible, black women are immoral, and black children run wild. . . . What African Americans need, according to what is often called ‘the new consensus,’ are not government programs but a good dose of sexual restraint, marital commitment, and parental discipline.”⁷¹

With respect to crime, conservative proponents of law and order claim that moral decline produced particularly dangerous offenders. These conservatives “located the root causes of contemporary urban crime in what they characterized as a growing problem of ‘moral poverty’—family breakdown, social disorganization, drug use, and the like—which had spawned a new generation of selfish, impulsive, predator propensities of morally impoverished street criminals.”⁷² The idea that this moral decline has produced a “new” type of predatory youthful offender was a particularly common trope in the rhetoric justifying mass incarceration. As the conservative criminologist James Wilson put it, “[w]e are terrified by the prospect of innocent people being gunned down at random, without warning and almost without motive, by youngsters who afterward show us the blank, unremorseful faces of seemingly feral, presocial beings.”⁷³ *Time* magazine wrote in a 1977 cover story on juvenile crime that “[a] new remorseless mutant juvenile

⁶⁸ MICHAEL FLAMM, *LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960s* 4 (2005).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 235 (2d ed. 2000).

⁷² PAGER, *supra* note 28, at 17-18.

⁷³ JOEL BEST, *RANDOM VIOLENCE* 2-3 (1999) (quoting James Q. Wilson, *What to Do About Crime*, COMMENTARY, Sept. 1994, at 25, 26). Jerome Miller has pointed out that this is a cyclically recurring theme:

With rising concern over urban violence in the 1980s and 1990s came the recycling of the familiar “new breed” theory of young offenders—with the implicit focus on the young black male offender.

. . .

Politicians and human-service professionals alike periodically call the public’s attention to this ostensibly more unfeeling, cold, and dangerous young offender who now stalks our streets.

JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* 37-38 (1996).

seems to have been born, and there is no more terrifying figure in America today.”⁷⁴

A related theme is that the violence such amoral offenders produce is “random,” and all the more terrifying and dangerous for its senseless, unpredictable quality. “The message seemed to be that random violence is everywhere and you are no longer safe—not in your suburban home, commuter train, or automobile—and the police and the courts cannot or will not help you.”⁷⁵ Joel Best has pointed out that implicit in these representations of violence as random is a theme of deterioration. “Warnings about random violence imply that things are getting worse, that there are ever more violent incidents, that respectable citizens run greater risks of victimization than in the past.”⁷⁶ Simply put, conservative advocates of law and order during this time readily thought of crime and criminals in monstrous terms for reasons arising directly from moral concerns.⁷⁷

B. *Moral Breakdown Versus Moral Strain*

What lies at the heart of this law and order rhetoric about moral breakdown used to justify the policies of mass incarceration is a particular but unarticulated vision of moral decline. Moral decline can take many forms, but mass incarceration—given the enormous and entirely foreseeable disintegrative effects described in Part II of this Article—can only be legitimately justified by what I would term a complete moral breakdown. When a policy of punishment so completely disintegrates a community—socially, economically, and politically—the only legitimate grounds for continuing to carry out this punishment would be that the community essentially has to be disintegrated in order to be repaired. References by conservative proponents of mass incarceration to a “new” breed of remorseless, “presocial” predators born of “moral poverty”⁷⁸ use rhetorically loaded language to evoke conceptions of normless individuals and communities without fully articulating what is being implied—that the process for maintaining and transmitting moral norms has effectively broken down.

A complete moral breakdown leaves a community essentially normless, and a normless community is different from a community whose norms are merely under strain. A community with strained norms may suffer high levels of crime and social disorder, but the norms of good behavior will reassert themselves once the strain is removed or ameliorated. Material assistance to a community without norms will not result in its moral rehabilita-

⁷⁴ PHILIP JENKINS, *DECADE OF NIGHTMARES* 137 (2006).

⁷⁵ BEST, *supra* note 73, at 3 (quoting Jerome H. Skolnick, *Wild Pitch: “Three Strikes, You’re Out” and Other Bad Calls on Crime*, AM. PROSPECT, Spring 1994, at 30, 34-5).

⁷⁶ *Id.* at 9-10.

⁷⁷ See Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 830 (2000).

⁷⁸ See *supra* notes 71-77 and accompanying text.

tion. Material assistance to a normless community is like watering ground that has no seeds: nothing will grow from nothing. In fact, given the lack of personal responsibility in a normless community, material assistance may actually result in further moral corruption as people are enabled to continue lifestyles that are decadent and unproductive. Welfare assistance and jobs programs for such a community cannot create norms of responsible behavior but may in fact retard their development if such programs make life too easy and cause community members to lose their motivation to improve their own lives.

What a normless community requires above all is moral education to regenerate lost norms about how to behave in civil society. Moral education provides the seeds from which healthy norms of behavior can grow and take root. This pressing need for moral education in a normless community is best served by a fundamentalist approach to criminal punishment where contextual factors do not excuse or mitigate responsibility. African Americans who lack norms of social responsibility and self reliance risk being corrupted by the idea that their problems are not their fault, and are instead the fault of racial problems in society. Under this style of reasoning, any further remedy beyond the elimination of formal discrimination runs the risk of compounding the loss of personal responsibility that attends normlessness.

Such fundamentalist theories of criminal punishment imply certain approaches to the enforcement of the criminal law. In a community where the process of transmitting and maintaining moral values has broken down, the broader educative dimension of sentencing, rather than the individual circumstances of the particular case, becomes paramount. In such a community, the criminal justice system must impose punishment categorically and forcefully in order to inculcate and reestablish the lost norms of moral behavior.

Tone and atmosphere also become important in a normless community. Public disorder undermines the morally educative function of the law that is so essential to restoring a normless community to a healthy state. Minor transgressions must therefore be punished severely in order to set the right tone for the community so that replanted norms can take root and flourish.⁷⁹ Zero tolerance policies make sense in a normless society because consistency is the best way to establish the authority of new norms in the face of an ever present tendency to backslide to the easier and normless ways of the past.

In a normless community, the criminal law must also take an aggressive approach to personal vices. Drug use in particular must be dealt with harshly in normless communities because the escape from reality that drug use permits will disable the community members from exercising the neces-

⁷⁹ For a discussion and critique of Order-Maintenance (“Broken Windows”) approaches to law enforcement, see generally BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001).

sary discipline for moral development and productive life.⁸⁰ Many people believe that crime is contagious in a normless community. Just as an infection spreads quickly through a weakened host, crime spreads through normless communities because of their essential emptiness. Epidemics of drug use or crime spread in a normless community because they give some sense of meaning, connection, or at the very least diversion to individuals whose lives lack these elements.

A normless community is also a place where offenders are likely to be beyond rehabilitation. Normless people are dangerous because their lack of attachment to family or community means that they are unfeeling, just like the imagined predators described earlier. Such offenders must be closely monitored and swiftly incapacitated. The children who come of age in a normless community are in particular to be feared because they presumably received insufficient moral education during their formative years. They are poor candidates for rehabilitation because therapy and counseling programs can hardly be expected to make up for the absence of early moral education from their family or community.

In sum, the die has already been cast for offenders in normless communities, so the best thing to do is to simply turn the page on the current crop and hope to create a clearer moral order through categorically applied, draconian sentences that allow communities to raise a better generation of children.⁸¹

IV. AFRICAN AMERICAN NORM STRAIN AND THE ECONOMIC STRESSES OF THE 1980S AND 1990S

A community with norms under strain is, in contrast, a very different sort of place that requires a very different type of criminal justice policy. Norms can be strained by any number of material conditions: wars; episodes of widespread violence; poverty; and massive migrations of people. In a community suffering strain to its norms, the criminal justice system can consider the individual circumstances of the particular offense and offender with relatively little fear that reasonable acts of leniency will be construed in the community as an abdication of moral authority. The pressure on the criminal justice system to play a morally educative role is less. The expressive dimension of the law can take a back seat to the task of doing justice in the individual case. More to the point, the system can balance the disintegrative effects of incarceration upon both the individual and the community

⁸⁰ For a discussion of the role that the War Against Drugs plays in the mass incarceration of African Americans, see MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 4 (1995). Admittedly, the violence attendant the business of producing and selling illegal drugs is significant. See generally ALEX ALVAREZ & RONEE BACHMAN, *MURDER AMERICAN STYLE* 156-58 (2003).

⁸¹ For a description and critique of the punitive turn in the treatment of juveniles in the criminal justice system, see generally FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* (1998).

against the potential for eventually reintegrating the offender into the community. Minor crime can also be punished lightly because social disorder is understood to be an incident of socioeconomic strain, not as evidence of deep dysfunction. Casual drug use can also be punished less severely because it is less likely that it will grow to epidemic proportions if not harshly deterred.

The premise of moral breakdown in African American communities—while much assumed—has never been formally defended, and persuasive social science evidence suggests that African American inner city communities did not become normless during the 1960s and 1970s. Rather, the norms of these communities became strained by the emergence of a new, concentrated form of jobless poverty that emerged shortly after African Americans had migrated to the urban areas in unprecedented numbers. Despite these strains, African Americans in the communities most affected continued to believe fiercely in the importance of family and hard work. For this reason, the fundamentalist policies of mass incarceration have been a tragically flawed response to urban crime, a response whose collateral damage to African American families and communities was not just unnecessary but actually counterproductive.

A. *The Emergence of Jobless Poverty in African American Inner City Communities*

Poverty became more concentrated in many poor, urban neighborhoods during the 1980s and 1990s. Our nation's central cities went from containing one third of the nation's poor in 1959 to containing one half in 1991.⁸² William Julius Wilson has measured urban poverty in terms of ghetto poverty census tracts, census tracts in which 40% or more of the population live at or below the poverty line.⁸³ The number of census tracts with 40% poverty in our nation's one hundred largest central cities doubled between 1970 and 1996; currently one out of every seven census tracts in these hundred cities is "ghetto poor."⁸⁴

As ghettos became poorer, they changed in other ways as well. Urban ghettos became blacker during the 80s and 90s. "The number of African Americans in these ghettos grew by more than a third from 1980 to 1990," and "[t]he proportion of metropolitan blacks who live in ghetto areas climbed from more than a third (37 percent) to almost half (45 percent)." African American urban ghettos also spread in size during the 1980s and 1990s even as the number of people living in cities generally and in the ghetto tracts themselves either declined or grew modestly.⁸⁵ For example,

⁸² WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 11 (1996).

⁸³ *Id.* at 12-13.

⁸⁴ *Id.* at 14.

⁸⁵ *Id.*

ghetto census tracts in one Chicago study lost almost half their residents between 1970 and 1990.⁸⁶

This simultaneous thinning and spreading of the ghetto directly affects crime, the perception of crime, and community life more generally:

The geographic size of a city's ghetto has a large effect on the perception of the magnitude of the problem associated with ghetto poverty. How big an area of the city do you consider off limits? How far out of your way will you drive not to go through a dangerous area? Indeed, the lower density exacerbated the problem. More abandoned buildings mean more places for crack dens and criminal enterprises. Police trying to protect a given number of citizens have to be stretched over a wider number of square miles, making it less likely that criminals will be caught. Lower density also makes it harder for a sense of community to develop, or for people to feel that they can find safety in numbers.⁸⁷

Ghetto spread, then, perniciously concentrates disadvantage. As fewer poor people are spread over a larger area, fighting crime becomes more difficult and the perception of crime grows with the increase in the size of the ghetto itself.

The most important change in urban ghetto poverty during the last few decades, however, was the loss of good jobs for those who lived there. William Julius Wilson argues that joblessness distinguishes the contemporary urban poverty of inner-city African communities from its previous forms and accounts for the increase in many of the inner cities' social ills, including crime. Inner-city African American communities went from places where most people worked, albeit at very low wages, to places where work was infrequent, unreliable, and sometimes non-existent. Writing in 1996, Wilson wrote: "For the first time in the twentieth century most adults in many inner city ghetto neighborhoods are not working in a typical week. . . . Despite increases in the concentration of poverty since 1970, inner cities have always featured high levels of poverty, but the current levels of joblessness in some neighborhoods are unprecedented."⁸⁸

The image of the jobless, crime-ridden urban ghetto has become so familiar that it bears emphasis that widespread, chronic unemployment in American ghettos was something very new indeed: "The inner-city ghetto was not always plagued by low levels of employment and related problems. In the 1950s, employment rates were high. People were poor, but they were still working. Ghetto neighborhoods were as highly segregated as they are

⁸⁶ *Id.* at 16.

⁸⁷ *Id.* at 14-15 (quoting Paul A. Jargowsky, *Ghetto Poverty Among Blacks in the 1980s*, 13 J. POL'Y ANALYSIS & MGMT 288, 297 (1994)).

⁸⁸ *Id.* at xiii. In fifteen black community areas in Chicago that Wilson studied in depth, "only 37 percent of all adults were gainfully employed in a typical week in 1990." *Id.* at 19.

now, but people were working.”⁸⁹ African Americans had flocked in large numbers to these urban communities during the postwar expansion to fulfill the promise of steadier work, higher wages, and a better life. That promise had been fulfilled for many even though these internal migrants faced the same barriers that the nation’s immigrants from other countries had to face. African Americans were also “knocked off the job ladder” by each wave of arriving immigrants, all of whom shared the important advantage of simply not being African American.⁹⁰

Wilson makes the important point that poor neighborhoods where people are working have much less serious problems than poor, jobless neighborhoods.⁹¹

The consequences of high neighborhood joblessness are more devastating than those of high neighborhood poverty. A neighborhood in which people are poor but employed is different from a neighborhood in which people are poor and jobless. Many of today’s problems in the inner-city ghetto neighborhoods—crime, family dissolution, welfare, low levels of social organization, and so on—are fundamentally a consequence of the disappearance of work.⁹²

Jobs disappeared from many African American communities during the 1980s and 1990s, and the resulting jobless poverty created social conditions very different from the working poverty that preceded it.

The disappearance of jobs from America’s urban ghettos was part of a more general economic trend. Jobs disappeared from the ghetto largely because jobs for low-skilled workers of all races began to decline in the 1970s. Real wages for low-skilled workers dropped 30% between 1970 and 1989.⁹³ Jobs also became less dependable, with many more low-skilled workers holding down part-time or temporary jobs and experiencing longer periods of unemployment.⁹⁴ The number of prime-age men without high school diplomas who worked year round in eight out of ten years went from two thirds in the 1970s to half in the 1980s.⁹⁵

While clearly part of a national trend, the loss of jobs hit African Americans particularly hard, especially in the deindustrialized cities of the Northeast and Midwest:

⁸⁹ *Id.* at 53-54.

⁹⁰ COONTZ, *supra* note 71, at 237.

⁹¹ WILSON, *supra* note 82, at 23 (“Although high-jobless neighborhoods also feature concentrated poverty, high rates of neighborhood poverty are less likely to trigger problems of social organization if the residents are working.”).

⁹² *Id.* at xiii.

⁹³ *Id.* at 25.

⁹⁴ *Id.* at 26-27.

⁹⁵ *Id.* at 26 (defining “prime age” as between the ages of twenty-two and fifty-eight).

Between 1979 and 1984, half the black workers in durable-goods manufacturing in the Great Lakes region lost their jobs. The proportion of black men who found employment fell from 80 percent in 1930 to 56 percent in 1983. . . . Since 1973, even the gains that employed black men made during the 1960s have largely been reversed. The average real income of young black men fell by almost 50 percent between 1973 and 1986. . . . [B]y 1986, the average black high school dropout earned 61 percent less than he had in 1973.⁹⁶

The job losses of the 1970s and 1980s hit African American communities all the harder because their economic progress during the postwar years had been far more mixed than those of other groups.⁹⁷

It bears emphasis that these jobs never came back. The economic expansion of the 1990s left the unskilled worker largely behind. "While the American economy saw a rapid expansion in high technology and services, especially advanced services, growth in blue-collar factory, transportation, and construction jobs, traditionally held by men, has not kept pace with the rise in the working-age population."⁹⁸ This shift in employment patterns hit the poor, the uneducated, and minorities hardest of all. "The decline of the mass production system, the decreasing availability of lower-skilled blue-collar jobs, and the growing importance of training and education in the higher-growth industries adversely affected the employment rates and earnings of low-skilled black workers, many of whom are concentrated in inner city ghettos."⁹⁹

Wilson points out the multiple ways in which this concentrated and chronic joblessness can perpetuate itself.

[W]here jobs are scarce, where people rarely, if ever, have the opportunity to help their friends and neighbors find jobs, and where there is a disruptive or degraded school life purporting to prepare youngsters for eventual participation in the work force, many people eventually lose their feeling of connectedness to work in the formal economy; they no longer expect work to be a regular, and regulating, force in their lives. In the case of young

⁹⁶ COONTZ, *supra* note 71, at 245.

⁹⁷ *Id.* at 243. Coontz explains:

[A]s early as the mid-1950s, the displacement of blacks from southern agriculture began to outstrip the job openings in other areas of the economy, leading to steadily rising unemployment even in periods when employed blacks made relative wage gains. Even during the height of black social and legal progress, unemployment and economic polarization increased, and poverty remained severe.

Id.

⁹⁸ WILSON, *supra* note 82, at 26.

⁹⁹ *Id.* at 54. "Among prime-age nonwhite males, the share of those who had no jobs at all in a given year increased from 3 percent to 17 percent during the last quarter century." *Id.* at 26.

people, they may grow up in an environment that lacks the idea of work as a central experience of adult life—they have little or no labor-force attachment.¹⁰⁰

In sum, the 1970s saw the emergence of bigger, blacker, poorer, and more jobless ghettos. One needs to indulge in no presumptions of moral breakdown to explain an increase in crime as a result. Whether norms were strained or completely broken down would at best remain a completely open question in the absence of any direct evidence, a woefully inadequate basis for the employment of a practice as radical and disintegrative as mass incarceration.

B. The Enduring Norms of Poor African American Communities

When one takes full account of the staggering economic losses suffered by the African American inner city during the 1970s, 1980s, and 1990s, one might well understand the widespread belief in a complete moral breakdown. How could African Americans living in such communities continue to believe that education and hard work would allow them to get ahead? How could the African American family withstand the strain of chronic jobless poverty without breaking down? Those who have studied these questions have found that poor African Americans believe more in the “American Dream” than middle-class blacks, and that changes in the African American family reflect not a loss of faith in family values but a fierce determination to find meaning in family life under the most difficult of circumstances.

In a comprehensive survey of African American attitudes and opinions, Jennifer Hochschild sought to assess the depth and extent of African American belief in “the American Dream,” the belief that anyone in America could prosper through determined effort. Overall, she found that “blacks and whites believe equally in the dream as a prescription for society and almost equally as a description of their own lives.”¹⁰¹ She also found a paradox, however.

“As the objective circumstances of the best-off third of blacks have improved dramatically over the past thirty years, their belief in the American dream has *declined* sharply. . . . As the objective circumstances of the worst-off third of blacks have remained dismal or worsened, their belief in the American dream has *not* declined very much.”¹⁰²

Just as people who become richer do not become happier, people who become poorer “do not in any simple way become more embittered or despair-

¹⁰⁰ *Id.* at 52-53.

¹⁰¹ JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM* 4 (1995).

¹⁰² *Id.* at 5.

ing.”¹⁰³ Moreover, “[m]ost poor blacks . . . see two paths to achieving their dreams: education and work.”¹⁰⁴

Poor African American families believe strongly in education according to Hochschild’s work. “[C]ontrolling for sex and socioeconomic status, African Americans are no more likely to drop out of school than whites, are more likely to choose an academic than a vocational curriculum, and are more likely to choose a four-year than a two-year college.”¹⁰⁵ In one study, Hochschild discovered that poor youth considered hard work and education to be more important than money and connections in getting ahead:

Over 90 percent of youth in public job training programs see education as very important in “getting ahead.” This response receives 30 percentage points more support than the next most important criterion, “hard work,” which comes in ahead of “money in the family” and “knowing the right people.” Although almost all of this sample was black, fewer than one third deemed race very important in determining success.¹⁰⁶

Hochschild also found that poor blacks compared very favorably to other racial groups in terms of willingness to work:

Many more black than white or Latina poor jobless mothers want a regular job and are willing to work more than five days a week. The level of wages below which poor blacks will not accept a job is almost as low as immigrants and much lower than comparably poor whites. Jobless young black men are much more willing than comparable white men to accept unskilled jobs at low wages, despite their higher aspirations to skilled or white-collar jobs. . . . Almost twice as many poor blacks (24 percent) as poor whites (14 percent) agree that learning “to work hard” is the most important thing a child can do to “prepare him or her for life.” Many more low-status blacks than any other racial/class group describe themselves as “hard-working”; conversely three times as many well-off as poor blacks admit that “not trying hard enough” has kept them from getting good jobs.¹⁰⁷

Similarly, careful research has authoritatively refuted the idea that poor African Americans have abandoned mainstream family values. What much research shows instead is that African Americans in poor communities have been frustrated in their ability to fully realize their values by circumstance.

¹⁰³ *Id.* at 8.

¹⁰⁴ *Id.* at 159.

¹⁰⁵ *Id.* at 160.

¹⁰⁶ *Id.* at 159-60.

¹⁰⁷ HOCHSCHILD, *supra* note 101, at 160-61. Hochschild does acknowledge that among what she terms the “estranged poor,” the American Dream becomes distorted in ways that can produce serious crime and dysfunctional behavior. *See id.* at 184-99.

In a comprehensive review of the research on African American families, Stephanie Coontz debunked the idea that the African American family has collapsed.¹⁰⁸ The idea of the collapse of the African American family, Coontz points out, is hardly new. “In almost every decade, for 200 years, someone has ‘discovered’ that the black family is falling apart.”¹⁰⁹

Coontz argues that the history of African American families from the end of slavery through the mid twentieth century is one of tremendous commitment to family despite enormous challenges. Indeed, Coontz points out that much of black economic history can be understood in terms of a desire to keep families together”:

After the Civil War, African Americans went to tremendous lengths to track down kin, reunite families, and resist destabilizing family conditions, such as gang labor.” . . . In response to these pressures many blacks turned to sharecropping as a way of keeping their families together. Others moved to the cities or made their way north, taking their families along or sending for them as soon as possible.¹¹⁰

Coontz also notes that African Americans resisted these strains on their families well for a very long time. The largest difference between black and white households at the start of the nineteenth century was that black households were more likely to include additional relatives or entire subfamilies. Unemployment, low wages, and poverty made such extended households necessary, and sometimes split families up as men left to seek work. Economic pressure also made married black women five times more likely to work for wages than married white women.¹¹¹ Most African Americans lived in two-parent households throughout the nineteenth century.¹¹² Marriage rates were higher among African Americans than among whites.¹¹³

Indeed, Coontz describes ways in which African Americans have appeared to surpass other groups in their commitment to family. Under slavery, African Americans “built a generalized kinship system in which all adults looked after all children.”¹¹⁴ African American families also appear to have taken care of needy family members more than many other racial groups. “Studies of many cities in the nineteenth and twentieth centuries reveal that African American families maintained tighter and more supportive kin ties than did other urban families, taking care of elders, paupers, and orphans within family networks rather than institutionalizing them as fre-

¹⁰⁸ COONTZ, *supra* note 71, at 235.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 239 (citations omitted).

¹¹¹ *Id.* at 240-41.

¹¹² *Id.* at 239; *see also id.* at 241 (“Until the 1960s, 75 percent of black households with a child under the age of eighteen included both a husband and a wife.”).

¹¹³ *Id.* at 241 (“From 1900 to 1950, marriage rates were higher for black women than for white ones, and black men were just as likely to marry as were white men.”).

¹¹⁴ COONTZ, *supra* note 71, at 238.

quently as other groups did.”¹¹⁵ In sum, Coontz concludes that “[m]any of the family variations practiced by black Americans have produced healthy individuals with a strong group consciousness, allowing them to cope with widespread violence, discrimination, and poverty, and in many cases to rise above these.”¹¹⁶

Coontz acknowledges that these communities suffered increased drug addiction, child neglect, and violence. She denies, however, that these conditions were the results of an absence of family values.¹¹⁷ “The description of the ghetto as an alien nation, with totally different family values from mainstream America, is a gross exaggeration.”¹¹⁸ Coontz summarizes research showing that even under these difficult conditions, the performance of African American men in these communities as fathers is far better than the public image allows and in some ways better than that of other racial groups.¹¹⁹ Ironically, adhering too closely to mainstream beliefs under non-mainstream conditions can itself create family dysfunction. “[T]he black men most likely to leave their families when faced with unemployment or income loss are those who subscribe most firmly to the idea of a self-reliant male breadwinner.”¹²⁰

Moreover, African American poverty is also not caused by changes in black family structure. “Two out of every three poor blacks living in single-parent families were poor *before* their families split up.”¹²¹ In fact, the me-

¹¹⁵ *Id.* at 241. Some of these earlier patterns persist: “black men, in spite of ‘macho’ images and language, are *more* likely to share housework than are their white counterparts.” *Id.* at 242.

¹¹⁶ *Id.* at 242.

¹¹⁷ *Id.* at 247.

¹¹⁸ *Id.* at 248.

¹¹⁹ *Id.* Coontz explains:

[A] recent study of three different ethnic neighborhoods in Brooklyn, New York, all relatively poor, found few differences in premarital sexual activity and responsibility between blacks and whites. A much higher proportion of white men married their partners on discovery of pregnancy, but most black fathers provided some degree of support for their children. . . . Indeed, in one national study, poor African-American, officially absent fathers actually had *more* contact with their children and gave them more informal support than did white, middle-class absent fathers.

Id.

¹²⁰ COONTZ, *supra* note 71, at 250. Mainstream beliefs also create other types of stress for African American men caught in non-mainstream economic conditions:

Middle-class blacks who believe in a color-blind meritocracy experience tremendous stress when they encounter setbacks; some studies show that blacks who let themselves off the hook by admitting the obstacles posed by racism are better able to maintain work and educational commitment in the face of reverses than those who believe in the ethic of individual achievement.

Id.

¹²¹ *Id.* at 251. Further, Coontz argues:

If black family structures had been the same in 1984 as in 1973, the proportion of black children living in poverty would have fallen from 41 percent to 38 percent instead of rising to 43 percent—hardly enough of a difference to win a war on poverty. . . . The 69 percent increase in the number of blacks living at a level below *half*

dian income for African American men is so far behind the national median that Coontz calculates that each African American wife would need four African American husbands to achieve a middle class standard of living.¹²²

While many Americans attribute poverty to bad choices by welfare mothers having too many children out of wedlock, the statistics tell a different story. “Contrary to conventional wisdom, shifts in family structure have not been the most important factor explaining trends in American poverty rates in recent decades, though they were related to increasing child poverty rates in the 1970s and 1980s.”¹²³ Research also shows no significant relationship between Aid to Families with Dependant Children (“AFDC”) and out-of-wedlock births. “The rate of out-of-wedlock teen childbearing has nearly doubled since 1975, despite the fact that during the period the real value of AFDC, food stamps, and Medicaid had fallen, after adjusting for inflation.”¹²⁴ After “reviewing the results of more than one hundred empirical studies on the effects of welfare completed since 1975, analyzing the case files of more than 1,200 families receiving public assistance in four states, and interviewing officials from federal, state, and local government agencies,” the General Accounting Office concluded in 1987 that “there was no conclusive evidence to support the prevailing common beliefs that welfare discourages individuals from working, breaks up two-parent families, or affects the childbearing rates of unmarried women, even young unmarried women.”¹²⁵ In fact, the “average number of children in welfare families was slightly less than the average number in nonwelfare families.”¹²⁶ Simply put, “economic changes—such as economic growth and income inequality—have had the strongest association with trends in overall rates, regardless of how we measure poverty.”¹²⁷

While the proportion of single mother families among African Americans has increased, that increase is not because either African American men or women have grown disenchanted with marriage but because of the poor job prospects of African American men.¹²⁸ Indeed, “employed black men in

the poverty line since 1978 has occurred among both black married-couple and female-headed families.

Id. at 252-53.

¹²² *Id.* (“If our hypothetical Black family is to enter the middle-class mainstream, which means home ownership, it will need at least \$36,595 or four Black men.”).

¹²³ JOHN ICELAND, *POVERTY IN AMERICA: A HANDBOOK 2* (2003).

¹²⁴ WILSON, *supra* note 82, at 94.

¹²⁵ *Id.* at 163-64.

¹²⁶ *Id.* at 166.

¹²⁷ ICELAND, *supra* note 123, at 2.

¹²⁸ COONTZ, *supra* note 71, at 251. Coontz explains:

The rising proportion of single-mother families among blacks results from both the declining birth rate of married black women and a drop in marriage and remarriage rates. Both these phenomena should be connected more to the deteriorating economic and social position of lower-income black men, denied job prospects by hyper-segregation and deindustrialization, than to any element of black “culture.”

Id.

the inner city were over two and a half times more likely to marry the mother of their child than were unemployed men; the higher a woman's earnings potential the more likely she was to marry.¹²⁹

More recently, sociologists Kathryn Edin and Maria Kefalas spent five years interviewing poor, unmarried mothers soon after childbirth in an effort to shed light on the decline of marriage among the poor.¹³⁰ While not limited to African Americans, most of their interview subjects were either African American or people of color.¹³¹ What they found, somewhat paradoxically, was that the related decisions to have children but not to marry were driven by a fierce commitment to traditional family values combined with a realistic appraisal of the challenges of doing both under circumstances of economic instability. Most of the parents they interviewed had been romantically involved with the baby's father at the time the baby was born, and four out of ten were cohabiting.¹³² The vast majority of these parents also expressed a plan to eventually marry although few were able to do so successfully.¹³³ Women expressed a reluctance to marry that was born out of a deep reverence for and commitment to the institution.

We spent five years talking in depth with women who populate some of America's poorest inner-city neighborhoods and, to our surprise, found astonishingly little evidence of the much-touted rejection of the institution of marriage among the poor. In fact, these mothers told us repeatedly that they revered marriage and hoped to be married themselves one day. Marriage was a dream that most still longed for, a luxury they hoped to indulge in someday when the time was right, but generally not something they saw happening in the near, or even the foreseeable, future.¹³⁴

Ironically, many poor women deferred marriage because of very conservative notions about divorce.¹³⁵ Many of the interviews suggested that "an

¹²⁹ *Id.* at 252.

¹³⁰ See KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE (2005).

¹³¹ *Id.* at 233.

¹³² *Id.* at 3-4.

¹³³ *Id.* No comparable work utilizing interviews with African American men exists. Elijah Anderson devotes one chapter of a wide-ranging ethnography of inner city life to "the mating game." ELIJAH ANDERSON, CODE OF THE STREET: DECENCY, VIOLENCE AND THE MORAL LIFE OF THE INNER CITY 142-78 (1999). In that chapter, Anderson describes a generally irresponsible and immature approach to sexual activity and relationships by young African American men, although he suggests that these behaviors are shaped in part by the limited economic prospects these young men enjoy. "At times, however, a boy earnestly attempts to be a dream man, with honorable intentions of 'doing right' by the young woman, of marrying her and living happily ever after according to their version of middle-class propriety. But the reality of his poor employment prospects makes it hard for him to follow through." *Id.* at 153.

¹³⁴ EDIN & KEFALAS, *supra* note 130, at 6.

¹³⁵ *Id.* at 9 ("The poor women we talked to . . . believe it is better to have children outside of marriage than to marry unwisely only to get divorced later. . . . 'I don't believe in divorce—that's why none of the women in my family are married.'").

expectant mother uses pregnancy to test the strength of her bond with her man and take a measure of his moral worth. Can he ‘get himself together’—find a job, settle down, and become a family man—in time?”¹³⁶ Poor women also deferred marriage in part out of fears of dependence born of their own economic weakness.¹³⁷

While the women interviewed readily deferred marriage out of a sense of reverence, they were unwilling to defer childbearing because of the deep sense of meaning and responsibility they derived from being a mother. “While the poor women we interviewed saw marriage as a luxury, something they aspired to but feared they might never achieve, they judged children to be a necessity, an absolutely essential part of a young woman’s life, the chief source of identity and meaning.”¹³⁸ Indeed, particularly troubled young women often described having a baby as an act of ultimate responsibility, an attempt to remake one’s self by taking on a sacred obligation to another. “These mothers, we discovered, almost never see children as bringing them hardship; instead, they manage to credit virtually every bit of good in their lives to the fact they have children—they believe motherhood has ‘saved’ them.”¹³⁹

C. Criminal Justice Fundamentalism as a Flawed Response to Moral Strain

Mass incarceration profoundly harms the most vulnerable part of the African American population by disintegrating legions of African American men from family and economic life. In so doing, mass incarceration effectively rolls back many of the gains of the civil rights movement for African

¹³⁶ *Id.* at 7.

¹³⁷ *Id.* at 9. As Edin and Kefalas explain:

Poor women often say they don’t want to marry until they are “set” economically and established in a career. A young mother often fears marriage will mean a loss of control—she believes that saying “I do” will suddenly transform her man into an authoritarian head of the house who insists on making all the decisions, who thinks that he “owns” her. Having her own earnings and assets buys her some “say-so” power and some freedom from a man’s attempts to control her behavior.

Id.

¹³⁸ *Id.* at 6.

¹³⁹ *Id.* at 11. While perhaps not a recipe for childrearing under ideal circumstances, the desire of this group of particularly troubled poor women to improve themselves by taking on the obligations of raising a child expresses a hyper-developed faith in the power of and need for personal responsibility to make life meaningful. Edin and Kefalas write:

[W]e paint a portrait of the lives of these young women before pregnancy, a portrait that details the extreme loneliness, the struggle with parents and peers, the wild behavior, the depression and despair, the school failure, the drugs, and the general sense that life has spun completely out of control. Into this void comes a pregnancy and then a baby, bringing the purpose, the validation, the companionship, and the order that young women feel have been so sorely lacking. In some profound sense, these young women believe, a baby has the power to solve everything.

Id. at 10.

Americans living in the communities most affected. The emergence of the jobless ghetto traps residents in thinned out neighborhoods with high poverty rates. They live in “that part of town” that no one else wants to visit or acknowledge, and become scapegoats for the larger city’s problems. This is an intense form of social exclusion that rivals Jim Crow and other, earlier forms of racial subordination long since recognized as unjust and unwise.

These neighborhoods do produce serious crime out of statistical proportion to their population, but not out of moral proportion to their dire economic circumstances. Poverty has always produced more crime than abundance, and it should surprise no one that jobless poverty in particular produces crime. Yet if we believe the direct evidence, the residents of these poor, jobless neighborhoods still cling to mainstream economic and family values. They believe as much in the American Dream as those who have a better opportunity to experience it. If anything, they hold themselves to unrealistic standards of achievement given their economic circumstances. With respect to family, these same people cherish the opportunity to bring children into the world so much that they often do so under the most tenuous of circumstances. They respect the institution of marriage so much that they will not risk entering one if they cannot see it enduring.

One can certainly disagree with the choices that inner-city African Americans make in pursuit of these values. African American women who deferred having children until they found a life partner might be better able to be the sort of parent that they would like to be. Even if true, however, the fault lies not in the failure of individuals to hold values but the failure to pursue them more effectively.

The fundamentalist approach to criminal justice dictates a categorical response to crimes, not a contextual one. Rather than making judgments about the individual and the crime at hand, criminal justice fundamentalism prioritizes the need to unambiguously condemn offenders without preparing them for eventual reintegration into the community. I have argued here that the criminal justice fundamentalists’ unarticulated premise is that crime in these communities occurs because individuals and the community lack mainstream values. Disintegrating the individual from the community through incarceration on a massive scale seems justified under such a premise because an offender without values has no potential of living an integrated life in his community. The fundamentalists believe that a normless community provides little into which such an offender could successfully reintegrate.

This presumption in favor of disintegration is a practical and moral mistake. It is a practical mistake because it frustrates its own primary goal—the prevention and control of crime. In destroying the normal life course of so many African American men, mass incarceration regenerates the crime it seeks to control. It is a moral mistake because it misconceives the possibilities of the individuals and communities involved by assuming them not to aspire to the same values as mainstream America.

The crime rate of inner city African American communities reflects serious strain on the norms of moral behavior, to be sure. Furthermore, the strain produced by concentrated jobless poverty shows no sign of lifting any time soon. In the meantime, it goes without saying that laws need to be enforced and offenders punished. What does not go without saying is that only the most severe and most inflexible sentences are appropriate responses to the crime produced by jobless poverty. One need ask for no special across-the-board discount for ghetto-poor offenders on account of socioeconomic disadvantage. One need only ask for a return to sentences that bear a more rational relation to the blameworthiness of the offender and to the harm of the offense and for a sentencing process that permits more room for contextual adjustments.

V. CONCLUSION

The continued quest for equal civil rights for African Americans is a battle with many fronts. Sound arguments can be made that continued progress on anti-discrimination and affirmative action in other arenas will gain more for the African American community in the foreseeable future than an attempt to take up the cause of the least popular and perhaps most despised element of their population—the incarcerated. The incarcerated are, after all, in prison by virtue of the fact that courts have found them to have committed crimes deemed serious by society. Making mass incarceration a central front in the battle for civil rights may be essential to making progress on any other front, however, because of the rhetorical effects of mass incarceration on the broader quest for civil rights for African Americans.

The mass incarceration of African Americans has come to seem normal in the same way that segregation once seemed normal. When a practice such as segregation or mass incarceration shapes much of what people think about some aspect of their society, that practice becomes what I would call a “social fact.” A social fact is an influential and pervasive practice that reinforces the justifications for its own existence in a self-perpetuating way. Segregation separated the races, and in that separation invidious racial attitudes and beliefs about African Americans flourished and in turn provided continued justification for the separation. Likewise, mass incarceration brands African American men from the inner cities as a largely criminal group, and it brands the neighborhoods in which they live as normless communities that have suffered complete moral breakdown. Those brands, in turn, justify the harsh penal practices that perpetuate the mass incarceration of African American men.

The influence of mass incarceration as a social fact, however, extends beyond simply perpetuating its own existence. In validating the myth of moral breakdown, mass incarceration directly undermines the broader movement for civil rights for all African Americans. Just as criminal justice fundamentalism views lenity in punishment as risking corruption of the

normless members of inner city communities, so too does a fundamentalist notion of racial justice view affirmative action and aggressive anti-discrimination measures as potentially corrupting those who have not yet internalized the values necessary to educational and economic success. Indeed, racial fundamentalism in its purest form argues that African Americans have been corrupted by the availability of the “excuse” of racial discrimination as an explanation for their lack of educational and economic success. Ultimately, both the criminal justice fundamentalism of mass incarceration and the racial fundamentalism of “color-blind” opposition to affirmative action and anti-discrimination measures are grounded in a vision of moral breakdown among African Americans. Just as the early successes of the civil rights movement rested heavily on appeals to moral authority, the backlash against that movement has relied heavily on a reverse sort of moral appeal—it has sought to strip the quest for racial justice of its moral authority by describing poor African Americans as essentially immoral.¹⁴⁰ In this sense, mass incarceration has “demoralized” the quest for continued racial justice.

Challenging the mass incarceration of African Americans is ultimately the most powerful and direct way of challenging the myth of moral breakdown among African Americans that is central to both mass incarceration and to opposition to further remedies for racial discrimination. In a very important sense, the criminal justice system has become the unguarded flank of the battle for racial justice, one that has been effectively exploited by those who would deny or minimize the existence of continuing racial discrimination and who would oppose affirmative measures to reduce its effects. Retaking that front is essential to “re-moralizing” the continuing fight for civil rights.

The national reaction to the Jena Six suggests that perhaps the time might indeed be ripe for such a challenge and that the ideology of mass incarceration may be waning. At the heart of the mass incarceration of African Americans is the selective enforcement and disproportionate punishment of racially neutral categories of crime. Those incarcerated are, for the most part, guilty of crime. What is most striking about the Jena Six case is that arguably many of the defendants broke one law or another. Nonetheless, 10,000 people from all over the country descended on Jena to protest the selective and disproportionate way in which these crimes were prosecuted.

To be sure, the central role which nooses played in the narrative of the case explains much of the response. The noose is a naked symbol of racial oppression given the shameful history of lynching of African Americans in our near past, and its deployment in the deep South triggered particularly powerful and painful memories.¹⁴¹ Still, it is interesting and perhaps promising that the people who marched on Jena did not require a more straightfor-

¹⁴⁰ See *supra* Part III.A.

¹⁴¹ See Jeannine Bell, *The Hangman's Noose and the Lynch Mob: Hate Speech and the Jena Six*, 44 HARV. C.R.-C.L. L. REV. 329 (2009).

ward moral narrative about innocent youth wrongly accused to trigger their sense of outrage. It was enough that the Jena Six were punished out of proportion to what they did, in a fundamentalist way that took no account of a context that matters very much. If the plight of these six—not entirely blameless but not sufficiently blameworthy—African American youth can trigger such response, maybe the time has come when we can successfully challenge the broader policies of mass incarceration that flow from the same fundamentalist mindset.